U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 May 2003

Case No. 2000-LHC-2323

OWCP No. 05-97381

In the Matter of:

PRESTON L. MCKELLAR,
Claimant

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer

Appearances:
Mary G. Commander, Esq., for Claimant
Lawrence P. Postal, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Preston L. McKellar ("Claimant") against Newport News Shipbuilding and Dry Dock Company ("Employer" or "the shipyard") for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (hereinafter "the Act"). Claimant seeks temporary total disability compensation from August 30, 1999 to October 26, 2001. Claimant alleges that, as the result of a compensable, work-related injury, he was unable to work during this time period. Employer counters that Claimant's injuries are permanent in nature, that he reached maximum medical improvement ("MMI") on August 30, 1999 and, therefore, he is limited to the scheduled award which has already been paid.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 20, 2002. (TR).[1] Claimant

[1] The following are references to the record:
EX - Employer's exhibit
CX - Claimant's exhibit
TR - Transcript of the hearing

submitted exhibits, identified as CX 1 through CX 12, which were admitted over Employer's objection. (TR at 17-19). Employer submitted exhibits, identified as EX 1 through EX 35 which were admitted without objection. (TR at 19). Simultaneous briefs were due in 60 days. The time for filing briefs was extended and the record closed on June 21, 2002.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Was Claimant's condition permanent prior to August 30, 1999?

2. If Claimant has not yet reached permanency, was Claimant temporarily totally disabled from August 30, 1999 to October 26, 2001?

STIPULATIONS

The parties have stipulated, and I find, that:

1. On October 5, 1995, Claimant suffered an injury to both hands. (TR at 13).

2. Claimant provided Employer timely notice of injury. (TR at 13).

3. Claimant's claim is timely. (TR at 13).

4. Employer made a timely first report of injury. (TR at 13).

5. Employer submitted a timely notice of controversion. (TR at 13).

6. At the time of injury, Claimant's average weekly wage was $749.39, resulting in a compensation rate of $499.59. (TR at 13).

7. Claimant's injury arose out of and in the course of employment. (TR at 13-14).

8. Jurisdiction under the Act is appropriate. (TR at 13).

9. Employer paid Claimant according to the schedule for three periods of disability. (TR at 14).

10. From August 4, 2000, through March 1, 2001, Claimant received 100% disability from the Veterans' Administration for an injury to his right knee. (TR at 14).

DISCUSSION OF LAW AND FACTS

A. Testimony of Preston L. McKellar

At the hearing Claimant testified that he had been employed by the shipyard since 1968. (TR at 20-21). He worked as a structural welder and shipfitter. (TR at 21). In 1995, Claimant was diagnosed by Dr. Shaughnessy, the shipyard clinic physician, with bilateral carpal tunnel syndrome, a finger injury, and an injury to the left elbow. (TR at 21-22). After this diagnosis, Claimant continued to work. Claimant testified that he was given restrictions by Dr. Shaughnessy of "limited repetitive use of both hands[,] no sustained gripping for the right hand and no vibratory tools for the right hand, [and] no vertical climbing." (TR at 22). Claimant has been treated for these injuries by Dr. Gwathmey since 1996. (TR at 22). According to Claimant, Dr. Gwathmey continued the restrictions given by the shipyard clinic. (TR at 23).

Claimant stopped working at the shipyard when he honored a strike in 1999. (TR at 23). He was called back to work after the strike ended in August 1999, but was sent to the shipyard clinic for review of his work restrictions. (TR at 26). After his evaluation at the clinic, Claimant returned to his work area. (TR at 26). His supervisor asked "'Well, you've still got the same restrictions?'" (TR at 26). Claimant responded, "'Yes, because they're permanent.'" (TR at 26). Upon hearing this, Claimant's supervisor told him that no work was available within his restrictions. (TR at 26). Claimant was told to report to the shipyard clinic the next day, August 31, 1999. When Claimant arrived at the clinic, he was passed out of work at the shipyard. (TR at 27). Claimant filed a grievance with the shipyard over its decision to pass him out of work because he believed that he was capable of performing his usual shipyard duties. (TR at 35).

Claimant had three surgeries performed on his hands. Claimant had left thumb trigger release surgery on October 4, 1999. (TR at 27-28). The next surgery Claimant underwent was right hand carpal tunnel release. This surgery was performed on January 22, 2001. (TR at 28). Claimant's third surgery was on June 26, 2001, for left hand carpal tunnel release. (TR at 28). When asked to explain the five-year delay between the date of his diagnosis and the carpal tunnel release surgeries, Claimant answered

> Okay. At the initial diagnosis of when I went to see Dr. Gwathmey, Dr. Gwathmey had told me that if I was to have surgery, it may put me out of work permanently and I may not ... the surgery may not help me significantly. So he said that if I go on permanent medical restrictions, I had a chance to finish my employment at Newport News Shipbuilding. So that's what I was told to do to continue to work since I was already working.

(TR at 29). When Claimant was asked to explain further why he decided to have the surgeries performed, he answered

> Well actually, it got . . . it got worse really. My thumb started locking down on me, and I couldn't lift it up. I had to put it up, you know, to get it up and what not, so that was a problem that I had to have corrected. And then the carpal tunnel got worse, so I figured I needed some relief from that, you know, so I did

that.

(TR at 30). According to Claimant, the surgeries improved his medical condition. He now has mobility in his thumb and the tingling and numbness in his hands is reduced. (TR at 30). The only other medical treatment that Claimant received between August of 1999 and October of 2001 was "periodic treatment" of cortisone shots from Dr. Gwathmey. (TR at 30). Claimant has since returned to work at the shipyard and is under the same restrictions he was given in 1999. (TR at 30).

When questioned once again about the delay in choosing to have the carpal tunnel release surgery, Claimant explained

> Like I was saying, I was really . . . I told you this before that the carpal tunnel situation got worse at the time with numbness and tingling. That's when I went on and had the surgery Dr. Gwathmey alluded to that.

(TR at 47). Employer's counsel asked for clarification on the Claimant's testimony that in October 1999 the carpal tunnel syndrome was not so painful as to require surgery. Claimant elaborated that

> My symptoms wasn't to the point where I wanted surgery. I actually wanted to go back to work to tell you the truth, and so I wasn't even looking for any surgery at that time. But as it gradually started tingling and numbness recurring or subsiding with more intensity, then I decided I'd go ahead and see if I could have carpal tunnel relief surgery.

(TR at 48).

Claimant testified that during the time he was out of work he made efforts to find employment that was within his medical restrictions. (TR at 30). He testified that he went to various employment agencies and that he applied with the Virginia Employment Commission. (TR at 30). Claimant received job leads and a labor market survey from the shipyard. Claimant testified that he went to every job listed in the information sent by the shipyard. (TR at 31). When he went to each job, Claimant said that he

> inquired about the job position and informed [prospective employers of] my medical restrictions also and I was inquiring about the work they gave me to work if it was available you know. Some of them basically did it. Most of them said they didn't have work available for my restrictions and what not. Some of the had . . . I think one of them said they have climbing major. . . At one of the security places, they said they had climbing in his job and they wouldn't be able to and some of them say that the restrictions couldn't be accommodated. Either service. . . One of them said that there was a service writing job and I didn't have any service writing experience as far as mechanics, service writing for an automotive place, so I was not suitable for that position according to them you know.

(TR at 32). Claimant also testified that he conducted a job search independent of the leads provided by the shipyard. (TR at 33). Claimant explained that

> I don't recall all the places I went, but I did make an effort. I went to the employment agency, the Virginia Employment Agency, and I got leads there and I submitted applications and basically you see in Newport News, I went to the library and found some job postings there. Then I submitted applications to those various places and what not.

(TR at 33). In spite of Claimant's efforts, he was not successful in obtaining employment outside the shipyard.

On cross-examination, Claimant explained that, while he was looking for safety jobs, he also applied for cashier positions. (TR at 38). Claimant could not provide names of employers with whom he had applied for cashier positions, except for Express Car Wash, a position about which Claimant was informed through the shipyard's vocational counselor. Claimant could not name any cashier positions for which he applied after learning of the position through the newspaper. (TR at 38). Claimant could not remember applying for any desk clerk jobs or any security guard jobs listed in the newspaper want ads. (TR at 39, 42). The only job Claimant could remember applying for as a result of a newspaper ad listing was "some college, I think" to which Claimant testified he faxed a resume. (TR at 39).

Claimant acknowledged that Dr. Gwathmey approved the security guard and cashier jobs in the labor market survey, but Claimant explained that he felt the cashier jobs were inappropriate because "for one reason the cashier, I had numbness and tingling in my hands and I have problems picking up the change and loose coins and what not for the cashier jobs. . ." (TR at 41). With regard to the security guard jobs, Claimant explained "I have flashbacks from Vietnam and security guard jobs sometimes put me in an area mentally of being armed. So just being on that particular job, I had great anxiety with the thought of that and that was a situation where it kind of upset me a little." (TR at 41).

Employer's counsel asked Claimant whether he represented to Mr. Hill at Ranstad Security that his work restrictions were more severe than the actual work restrictions issued by Dr. Gwathmey. Claimant responded that he could not recall everything that was discussed in the conversation. (TR at 45-47).

B. Deposition testimony of Dr. Frank W. Gwathmey

Dr. Frank W. Gwathmey was deposed on November 29, 2000. Dr. Gwathmey, a board-certified orthopedic surgeon, treated Claimant for his hand injuries. (EX 19 at 4). Dr. Gwathmey first saw Claimant on February 21, 1996. (EX 19 at 4). On this occasion Claimant gave a history of hand problems for most of the twenty-eight years he worked as a welder, with the problems increasing over the past few years. (EX 19 at 4-5). Claimant told Dr. Gwathmey that a Dr. Haynes had diagnosed Claimant with carpal tunnel syndrome and arthritis at the base of his thumb. Claimant told Dr. Gwathmey he had undergone a nerve conduction study of his hands in April 1995 which revealed bilateral carpal tunnel syndrome and cervical nerve root problems.

(EX 19 at 5). Dr. Gwathmey agreed that this diagnosis was accurate based on his examination of Claimant. The examination and hand x-rays confirmed the arthritis at the base of the thumbs, and a "positive grind test" led Dr. Gwathmey to conclude that Claimant's diagnosis was "bilateral carpal tunnel syndrome and trapeziometacarpal arthritis." (EX 19 at 6). When asked by Claimant's counsel whether he recommended any treatment or surgery for Claimant's condition, Dr. Gwathmey responded

> Not at that time. We discussed the possibility of surgery, what it might require, if he wanted to have anything done. We talked about how he could continue working if he didn't have surgery. And at that time we opted to do no surgery on him.

(EX 19 at 6). Dr. Gwathmey saw Claimant again in May 1997. (EX 19 at 6). At that time Claimant was again complaining of numbness in his hands and pain in his thumbs. (EX 19 at 6-7). Claimant was given injections for the pain in his thumbs. (EX 19 at 7). The injections provided some relief to Claimant and his thumbs were injected again in September 1998. (EX 19 at 7).

Claimant returned to Dr. Gwathmey's office on September 15, 1999. Claimant was still having problems with his thumbs, and at this visit the option of corrective surgery for the trigger thumb injury was discussed. (EX 19 at 7). By this time Claimant's thumb locked in extension and would not bend down. (EX 19 at 7). As a result of his continued thumb problems, Claimant underwent trigger thumb release surgery on his left thumb on October 4, 1999. (EX 19 at 8). His right thumb was not operated on because, although the right thumb exhibited some symptoms, it never locked. The right thumb was treated with injections only. Dr. Gwathmey opined that the right thumb injury appears to be static. (EX 19 at 8).

When asked whether he treated Claimant's carpal tunnel problems, Dr. Gwathmey answered that he had injected Claimant's carpal tunnel with cortisone to relieve the numbness. (EX 19 at 9). The injections only provide temporary relief, and were last administered by Dr. Gwathmey on October 19, 2000. (EX 19 at 9). There was no discussion at the October 19, 2000, appointment of any surgery for Claimant's carpal tunnel injury. (EX 19 at 9). Claimant only talked of having the cortisone shots. When asked whether he had an opinion as to whether Claimant's carpal tunnel might require surgery in the foreseeable future, Dr. Gwathmey replied

> Well, it's basically up to him. We've talked about it for several years, and he's been gun-shy of having surgery on the hands, and has opted to have injections. That's an alternative way of treating it, but it's a transitory way of doing it. The optimal treatment would be to have the surgery on it to give him permanent relief, but he's not opted to do that.

(EX 19 at 9-10). Dr. Gwathmey explained that by "transitory" treatment, he meant that "[o]ne might expect to see improvement anywhere from weeks to months, and then the symptoms would gradually come back on." (EX 19 at 10).

Dr. Gwathmey had placed Claimant on permanent restrictions in 1996. (EX 19 at 10). The restrictions of "no sustained gripping, limited use of vibratory tools and impact tools, and

limited repetitive use of both hands" remained the same throughout the time during which Claimant was under Dr. Gwathmey's care. (EX 19 at 10). These restrictions were not related to the trigger thumb injury, only to Claimant's carpal tunnel and trapeziometacarpal arthritis. (EX 19 at 11). The trigger thumb condition was completely corrected by surgery. (EX 19 at 10).

Employer sent a letter to Dr. Gwathmey in April 1997, asking whether Claimant had reached maximum medical improvement. (EX 19 at 11). At that time the doctor did not believe that Claimant reached MMI. (EX 19 at 11). He was asked whether, at the time of the deposition, Claimant had reached MMI. The doctor responded,

> No. It depends on the semantics of how you describe that. If he has no further treatment whatsoever, and accepts the hand the way he is, then he's at maximum medical improvement.
>
> There is improvement available to him should he decide to undergo surgical release of his carpal tunnel and repair of his trapeziometacarpal joints. So to that extent, he has not reached maximum medical improvement for what I could provide for him.

(EX 19 at 12). The doctor described the level of improvement he expected that Claimant might achieve if the procedures were performed to release Claimant's conditions as:

> I would hope to see alleviation of [Claimant's] carpal tunnel syndrome and alleviation of much of the pain that he would have in the thumb. He may still have some residuals with the carpal tunnel syndrome because of the length of time that it's been going on.
>
> I would expect to achieve 70 to 90 percent of improvement with the pain that he has in the thumb.

(EX 19 at 12).

Employer's counsel questioned Dr. Gwathmey regarding Claimant's trigger thumb condition. When asked whether the thumb condition was work-related, Dr. Gwathmey replied "I think probably so. It's a synovitis that involves the thumb that affects the tendons in the thumb, and from chronic use or gripping one gets inflammation there, and I think most likely it did come from that." (EX 19 at 13). The doctor explained that the trigger thumb condition did not result in any work restrictions, nor did the trigger thumb release surgery result in a change in Claimant's work restrictions. (EX 19 at 13).

Employer's counsel also questioned Dr. Gwathmey about the effects of any future carpal tunnel release surgery. Counsel asked the doctor whether Claimant's work restrictions would increase as a result of carpal tunnel surgery. The doctor answered

> No. I would hope to see them reduced somewhat. I would probably, again, depending on how he does after the surgery, would like to see those reduced to

> the point that we could eliminate [the restrictions on] the length of time that he could use his hands for gripping or vibratory tools to the point that he could do it to some extent.

(EX 19 at 15). The doctor was also asked to explain what he meant when he wrote in his office notes that, if Claimant had carpal tunnel surgery, he would not be able to return to shipyard work. The doctor explained that, in his opinion, the combination of the trigger thumb surgery, carpal tunnel surgery, and the requisite recovery time, would probably result in Claimant not returning to work at the Shipyard. (EX 19 at 15-17). The doctor summarized his opinion by saying that "It's not that [Claimant] couldn't do it, but empirically he wouldn't do it." (EX 19 at 17).

Dr. Gwathmey was asked whether Claimant's decision initially to decline surgery was a reasonable decision if Claimant was informed that he would be better off after the surgery. Dr. Gwathmey responded, "That's his call altogether. They're his hands. I tell him what's available, and what I can do for him, and try to guide him the best I can as to what the pros and cons are, and he makes the decision of whether or not he wants to have it." (EX 19 at 20). Employer's counsel followed up with this line of questioning:

> Q. [by Employer's counsel] Now, let me ask you this: If he never has the surgery, is it a correct statement he reached maximum medical improvement in February 1996?
>
> A. [by Dr. Gwathmey] I think if you take the – if you take the tact that he has declined surgery and will never have the surgery, I think that's accurate. At some point you either accept it the way it is, or you go further with it. He's decided to accept it like it is.
>
> So I think you could go back to the first time I saw him and say that he's basically at maximum medical improvement at that point, if he declines to go any further with treatment.

(EX 19 at 20-21).

The doctor discharged Claimant from his care in November 1999, because "he [Claimant] was not expecting to have surgery then, I'd done all that I was able to do for him at that time." (EX 19 at 21). The doctor felt that at least by November 1999 Claimant had reached maximum medical improvement. (EX 19 at 21). Dr. Gwathmey explained that Claimant's condition was essentially unchanged from February 1996 until November 1999. (EX 19 at 23). Furthermore, Dr. Gwathmey stated that by November 1999, he had given up on the idea of Claimant undergoing carpal tunnel release. (EX 19 at 23).

Dr. Gwathmey explained that he had approved all of the job descriptions sent to him by Employer and had gone over the jobs with Claimant. He also explained that Claimant was concerned that the security guard jobs might result in an altercation and that his hand injuries might prevent him from defending himself in such an altercation. (EX 19 at 26).

Dr. Gwathmey, in determining Claimant's disability rating, used the AMA Guidelines, Fourth Edition, and combined a four-percent rating for carpal tunnel syndrome with a six-percent rating for the arthritis, and trapeziometacarpal joints. (EX 19 at 27). The doctor then explained how his usual rating of five-percent for carpal tunnel syndrome was not appropriate for Claimant, and he was very vague about the actual method he used for assigning Claimant's ten-percent rating. (EX 19 at 27-28). Employer's counsel expressed his confusion regarding the method of calculating carpal tunnel disability ratings, to which Dr. Gwathmey replied, "I don't understand it either for carpal tunnel." (EX 19 at 28).

On redirect, Dr. Gwathmey acknowledged that he would be willing to go ahead with carpal tunnel release surgery if Claimant changed his mind and elected for surgery. (EX 19 at 29). When asked whether he expected Claimant to have the improvements he previously described, Dr. Gwathmey answered

> I would hope so. The only caveat – not a really a caveat, but the only disclaimer would be because of the length of time we've been following his carpal tunnel, they may not do as well today as they might have four years ago. I think the arthritis aspect would be the same either way.

(EX 19 at 29). The doctor agreed that if Claimant underwent carpal tunnel release his recovery time would be approximately eight months. (EX 19 at 30). The surgery is done on an out-patient basis at a cost, estimated by Dr. Gwathmey, of four thousand dollars. (EX 19 at 31). If Claimant's surgery was ultimately successful, Dr. Gwathmey indicated that it would be unlikely that Claimant's 1999 work restrictions would change. (EX 19 at 33).

C. Testimony of William Kay

William Kay works for ROI/GENEX as a rehabilitation counselor. (TR at 55). He is state-certified and asserts that he is approved for a similar position with OWCP but that no openings were currently available for him. Mr. Kay has a degree in psychology and almost thirty-three years of work experience in rehabilitation. He worked in the field of vocational rehabilitation for the Commonwealth of Virginia for more than twenty-eight years. His job included case management, coordinating services, and arranging for medical services. (TR at 56).

Mr. Kay was assigned to Claimant's file and he interviewed Claimant. (TR at 57). At the time of the interview Claimant was on crutches. According to Kay, Claimant's attorney did not want Kay to test Claimant at the interview. Kay agreed with Claimant's attorney to use the results of tests performed when Claimant was previously seen at Concentra Managed Care. Kay explained that those tests showed that Claimant "was functioning at a high school level except in Math and that was like 7th grade level I believe." (TR at 57).

Kay identified EX 16 as a labor market survey he prepared at Employer's request. (TR at 58). The first three categories of jobs identified in the survey were "unarmed security, customer service, and quality assurance." (TR at 58). When asked whether he identified appropriate job openings for Claimant, Kay replied "I felt like they were appropriate. I contacted them and the dates are listed when I contacted them. At that time they were taking applications. They were

hiring, or by checking with them, they had been hiring during the period of the labor market survey." (TR at 58).

Kay used newspaper clippings from the *Daily Press* newspaper to demonstrate that the jobs he identified were readily available in the community and were frequently advertised in the newspaper. (TR at 58-59). Kay expressed doubt that a person could pick up the Sunday newspaper and not find a listing in the want-ads for a cashier's job, counter desk clerk, or security guard. (TR at 59).

Kay testified that he arrived at a wage-earning capacity of $360.00 per week by averaging the wages for the job openings identified in the labor market survey. (TR at 59). Kay testified that the job openings identified were within Claimant's work restrictions and that Claimant had "more than the vocational ability to do most of these jobs." (TR at 60). Kay also felt that the jobs identified in the supplemental labor market survey (EX 17) were appropriate and within Claimant's restrictions. (TR at 61).

Kay sent job descriptions to Dr. Gwathmey for approval. (TR at 60). The first descriptions "got lost" but Kay sent a subsequent set of about thirty job descriptions to the doctor. All of the jobs were approved by Dr. Gwathmey and returned to Kay. (TR at 60).

Kay explained that his report (EX 21) documented his communications with various employers ensuring that the jobs identified were within Claimant's physical restrictions. (TR at 62). Kay was of the opinion that Claimant, during his job search, either failed to actually apply for jobs, applied for jobs that were outside of his vocational or educational capacity, or applied in such a way as to demonstrate that he was not interested in a job. (TR at 63-68). Furthermore, Kay identified several employers who left with him the impression that Claimant had exaggerated his restrictions beyond those assigned by Dr. Gwathmey. (TR at 65-66). When asked for his opinion whether Claimant's job search was diligent, Kay answered "Was that diligent? It certainly wasn't thorough." (TR at 70).

On cross-examination Kay conceded that Claimant, though qualified, would not likely be considered for the foreman position with W.M. Jordan Company. (TR at 74). Kay also agreed with Claimant's counsel that most of the available jobs would pay between $6.00 and $8.00 per hour rather than the $21,000 or $24,000 salaried positions at Kramer and Midas. (TR at 74-75).

In Kay's experience as vocational rehabilitation counselor he would be surprised that a person who had been through job club would have left no applications anywhere, even if positions were not currently available. (TR at 78). When asked about the aspects of a diligent job search Kay replied "I think if someone is doing a diligent job search, they will put in applications and they will follow up on them." (TR at 79).

D. Discussion of permanency of Claimant's injury

Claimant was paid a scheduled award for his injury, but asserts that he had not reached permanency prior to the August 30, 1999 to October 21, 2001 time period because he had yet to undergo carpal tunnel release surgery. Claimant argues that permanency, measured by MMI, will

not be reached until he has recovered fully from his carpal tunnel release surgery. Claimant underwent carpal tunnel release surgery in January and June 2001. Since the surgeries did not occur until after the term of disability claimed, Claimant argues he is entitled to temporary total disability from August 30, 1999 to October 26, 2001. Employer responds that Claimant's injury was permanent prior to the period of disability claimed and that Claimant is limited to compensation already paid under *Potomac Electric Power Co. v. Director (PEPCO)*, 449 U.S. 268 (1980).

A claimant's injury reaches permanency when the claimant is at maximum medical improvement, see *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989), or the claimant's impairment has continued for lengthy period of time and appears to be of a lasting or indefinite duration, see *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Permanency, primarily a medical determination, is reached when the claimant has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). Generally, permanency is not reached when claimant's condition is improving and is expected to improve further as a result of anticipated future surgery. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243 (1986). However, the mere possibility of future improvement does not prevent a finding of permanency. A disability will be considered permanent if the claimant's impairment has continued for a lengthy period and appears to be of a lasting or indefinitie duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson, supra*. "The determination that a disability is temporary rather than permanent need not be reached merely because the medical prognosis is that the employee is likely at some indefinite future date to get better and to be able to return to work." *Id*. at 654. Furthermore, the mere possibility of future surgery, by itself, does not preclude a finding that a condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986).

Claimant initially rejected carpal tunnel release surgery because Dr. Gwathmey suggested that it might prevent Claimant from returning to work at the shipyard. (TR at 29). Instead, Claimant chose cortisone-injection treatment and returned to work with restrictions and hopes of completing his career with the shipyard. (TR at 30; EX 19 at 6-7, 9). The cortisone-injection treatments lasted from February 1996 to October 2000. (EX 19 at 4, 21). The cortisone-injection treatments were a transitory solution for the pain associated with Claimant's carpal tunnel injury, providing only temporary relief of Claimant's symptoms. (EX 19 at 9-10). In November 1999, Dr. Gwathmey released Claimant from his care. (EX 19 at 21). Dr. Gwathmey testified that Claimant was released then because the course of treatment was no longer expected to improve Claimant's condition and he had given up hope that Claimant would elect to undergo carpal tunnel release surgery. (EX 19 at 23). Furthermore, Claimant testified at the hearing that his condition in October 1999 was not such that he considered choosing surgery at that time. (TR at 48). The evidence reveals that several discussions occurred between Claimant and Dr. Gwathmey in which were discussed the potential benefits of carpal tunnel release over cortisone-injection treatments and Claimant's continued refusal to undergo surgery to relieve his symptoms. (TR at 29; EX 19 at 6,7, 9-10).

The evidence is sufficient to support a finding that, at least by November 1999, Claimant's carpal tunnel condition had reached permanency. The possibility that Claimant would undergo

carpal tunnel release surgery was not only remote in November 1999, but the evidence supports a finding that it was specifically rejected by Claimant. His condition had continued for three years, with treatment providing only temporary relief of his symptoms, and at the time he was released by his treating physician the only reasonable conclusion was that Claimant would not choose surgery. Absent surgery, his condition could not be expected to improve.[2] The mere possibility of future surgery, in this case rejected by Claimant, does not prevent a finding that Claimant reached permanency by at least November 1999. *See Worthington, supra*.

That permanency was reached by November 1999 is not to say that it was not reached prior to this date. On the contrary, the medical opinion evidence of Dr. Gwathmey supports a finding that Claimant's condition reached permanency by February 1996. Dr. Gwathmey opined that, if Claimant declined ever to have carpal tunnel release surgery, February 1996 would be the appropriate date for maximum medical improvement because Claimant's condition was virtually unchanged from February 1996 to November 1999. (EX 19 at 23). This was also the position taken by Dr. Gwathmey in his April 1997 response to Employer's letter, in which he wrote that, if Claimant never had carpal tunnel release surgery, then he would have considered Claimant to have reached MMI at that time (EX 2). This conclusion also is consistent with Dr. Gwathmey's description of the cortisone-injection treatments as a "transitory" treatment for Claimant's condition (EX 19 at 10), and the fact that Claimant's work restrictions were unchanged from 1996 to present. Finally, Dr. Gwathmey's opinion that successful carpal tunnel surgery would not likely result in a change in Claimant's 1996 work restrictions (EX 19 at 33) lends additional support for February 1996 as the time when Claimant reached permanency.

Based on the evidence, I conclude that Claimant reached permanency no later than February 1996. Claimant's condition in February 1996, especially in light of his continued rejection of carpal tunnel release surgery, was not expected to improve[3] and would continue indefinitely. This is the very definition of permanency. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Claimant claims additional benefits from August 30, 1999 to October 26, 2001. Because permanency was reached before the date from which he claims additional benefits, I find that Claimant's injuries are permanent in nature, and he is limited to benefits already paid through the scheduled award, unless he can show that he is totally disabled. *See PEPCO*, *supra*; *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984).

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[2]In addition, the evidence supports a conclusion that Claimant's impairment likely would not improve even if Claimant elected to undergo carpal tunnel release surgery. At the hearing, Claimant testified that after his surgeries he returned to work at the shipyard under the same work restrictions presented by Dr. Gwathmey in 1999. (TR at 30). His testimony is complemented by Dr. Gwathmey's deposition testimony, in which the doctor explained that successful carpal tunnel release surgery likely would not result in a lessening of Claimant's work restrictions. (EX 19 at 33). Thus, regardless of whether Claimant chose surgery, Dr. Gwathmey did not expect that his condition would improve over time.

[3]In fact, Claimant testified that his condition actually worsened during the course of treatment. (TR at 30, 47-48).

It is noted that the Claimant has not asserted a claim for permanent total disability. However, in light of the finding herein, that his injuries became permanent in February of 1996, and in light of the fact that the Employer released him due to the absence of work within his restrictions in August of 1999, the issue of permanent total disability must be considered.

E. Discussion of total disability and *PEPCO*

Employer asserts that Claimant is precluded from obtaining additional compensation by the United States Supreme Court's decision in *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs (PEPCO)*. Employer argues that *PEPCO* bars relief because Claimant cannot demonstrate that he is permanently and totally disabled.

In *PEPCO*, the Supreme Court held that a permanently partially disabled claimant entitled to compensation under the statutory schedule may not elect to receive a larger recovery under Section 8(c)(21) measured by the actual impairment of wage-earning capacity caused by the scheduled injury. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs (PEPCO)*, 449 U.S. 268, 284 (1980). However, the Court explained that the situation where a claimant attempts to elect between awards is distinguishable from the case in which a claimant's scheduled injury later gives rise to an award of permanent total disability. *Id*. at 277 n. 17. The Court noted that its decision is consistent with *American Mutual Ins. Co. v. Jones*, in which the United States Court of Appeals for the District of Columbia Circuit held that where the facts show permanent total disability the claimant is not limited to the scheduled award. *Id*.; *see American Mutual Ins. Co. v. Jones*, 426 F.2d 1263, 1266 (D.C. Cir. 1970). Furthermore, the Supreme Court noted that *Jones* is consistent with section 8(a) of the Act, which applies only in cases of permanent partial disability. *Potomac Electric Power Co.*, 449 U.S. at 277 n.17 (explaining that "once it is determined that an employee is totally disabled the schedule becomes irrelevant"). Therefore, under *PEPCO* and *Jones*, a claimant, previously compensated for a scheduled injury, may in fact be totally disabled, and may pursue a claim for total disability, notwithstanding compensation previously paid pursuant to the schedule.

To establish that he is totally disabled, Claimant must demonstrate that because of the effects of his work-related injury he has no residual wage-earning capacity. Initially, Claimant must make a *prima facie* showing that he cannot return to his pre-injury employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997). Should Claimant make this showing, the burden shifts to Employer to rebut the finding of disability by establishing that suitable alternative employment exists which Claimant is capable of performing. *See Brooks v. Director, Office of Workers' Compensation Programs*, 2 F.3d 64, 65 (4th Cir. 1993) (per curiam). If Employer establishes that suitable alternative employment exists, Claimant may nevertheless demonstrate that he is totally disabled if he proves that he reasonably and diligently sought employment but was unable to secure a job. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). However, if Claimant cannot establish that he is totally disabled, he is limited to the compensation for permanent partial disability, which Employer has already voluntarily paid him.

1. Claimant's *prima facie* showing of total disability

Once a claimant has established that he cannot return to his pre-injury employment, a *prima facie* showing of disability is made. The burden then shifts to the employer to demonstrate that suitable alternative employment exists, such that the claimant retains some residual wage-earning capacity.

Claimant offered uncontradicted testimony that he was passed out of work in August 1999 because no work was available within his restrictions (TR at 26-7). Based on Claimant's testimony, I find that he has made a *prima facie* showing of disability under the Act.

2. Employer's burden to establish the existence of suitable alternative employment

Once a claimant makes a *prima facie* case of disability, the burden of production shifts to the employer to establish the existence of suitable alternative employment for which the claimant could realistically compete if he diligently tried. *Tann*, 841 F.2d at 542 (citing *Trans-State Dredging v. BRB*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 592 F.2d 762, 765 (4th Cir. 1979)). An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Alternatively, an employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981).

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for the claimant in his geographic area. *Royce v. Erich Constr. Co.*, 17 BRBS 157 (1985). For job opportunities to be realistic, the employer must establish the precise nature and terms of each job, *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989) (citing *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988)), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities within the claimant's local community which he is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging v. BRB*, 731 F.2d 199 (4th Cir. 1984).

In *Universal Maritime Corp. v. Moore*, the United States Court of Appeals for the Fourth Circuit held that an employer meets its burden by "demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the qualifications for performing such jobs." *Moore*, 126 F.3d at 265. The court explained that the burden imposed is parallel to that required by other compensation schemes which rely on standard occupational descriptions, including those provided by the Dictionary of Occupational Titles. *Id.*

Finally, when referencing the external labor market through a labor market survey to establish suitable alternative employment, an employer must "present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). According to the Fourth Circuit, "[i]f a vocational expert is able to identify and locate only one employment position, it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id*. The purpose of the labor market survey is not to find the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. *Tann*, 841 F.2d at 543. The employer may meet this burden of showing suitable available employment by "presenting evidence of jobs which, although no longer open when located, were available during the time the claimant was able to work." *Id*.

William Kay conducted a labor market survey (EX 16) on behalf of Employer. In addition, Kay conducted an addendum survey (EX 17), two responses to Claimant's job search (EX 21; EX 30) and an update to the job search responses (EX 22). Employer also submitted EX 23, which consists of thirty job analyses approved by Dr. Gwathmey. (EX 23).

Employer has presented a range of jobs.[4] Most of the jobs fall into the categories of customer service and unarmed security. Within these broad categories Kay's initial labor market survey identified nine specific jobs.[5] The labor market survey supports the conclusion that the

[4]The labor market survey contained lists of jobs and photocopies of newspaper classified ads as evidence of suitable alternative employment. I consider the job lists and newspaper ads only as evidence that the newspaper contains many job listings. However, newspaper classified ads are not evidence of suitable alternate employment as they do not contain sufficient information from which I can evaluate whether the jobs advertised are suitable.

[5]The initial labor market survey identified the following positions:

Date Contacted	**Employer**	**Position**	**Salary**	**Description**
09/28/2000	Security Services of America, Newport News, Virginia	Unarmed Security	$6.00 per hour	Hiring when contacted
10/10/2000	Wackenhut Corporation, Newport News, Virginia	Unarmed Security	$6.25 per hour	Hiring when contacted
09/27/2000	Top Guard, Newport News, Virginia	Unarmed Security	$5.15 per hour, $6.00 per hour after training	Hiring when contacted

jobs were available during the period of claimed disability.[6] In addition, the evidence supports the conclusion that the jobs identified in the labor market survey are within Claimant's geographic area.[7] Dr. Gwathmey indicated that the jobs were all appropriate in light of Claimant's physical restrictions. (EX 23 at 14, 22-29).

However, I do not consider the foreman position with W.M. Jordan an appropriate position. (EX 16 at 16, 25). Mr. Kay's testimony at the hearing confirmed that it would be unlikely that Claimant could realistically compete for the position, as the company prefers to promote a current employee rather than hire a new person for the position. (TR at 74). This position was not reasonably available to Claimant and thus is not evidence of suitable alternative employment. *See Tann, supra*.

There is not enough information in the labor market survey from which I can determine whether the Quality Control Inspector position (EX 16 at 26) is appropriate for Claimant. The job duties described are too general and the experience requirements are unspecified. Without more information I will not consider this position in determining whether Employer has satisfied its burden on the issue of suitable alternative employment.

Nor do I consider as evidence of suitable alternative employment the salaried position at Midas. (EX 16 at 12, 21-22). The evidence is unclear whether Claimant truly would have been a

10/10/2000	Midas, Newport News, Virginia	Service Advisor	$10.00 per hour	Accepting applications
10/01/2000	Kramer Tire Co., Norfolk, Virginia	Assistant Manager (Service Writer)	$11.50 per hour	Hiring when contacted
10/10/2000	Commonwealth Information Services, Newport News, Virginia	Collector I	$8.00 per hour	Hiring when contacted
09/27/2000	Express Car Wash, Hampton, Virginia	Cashier I	$6.00 per hour	Hiring when contacted
10/13/2000	W.M. Jordan Co., Newport News, Virginia	Assistant Superintendent	$16.00 per hour	Hiring when contacted
10/13/2000	Randstad, Portsmouth, Virginia	Quality Control Inspector	$12.00 per hour	Accepting applications

[6]All of the positions were described as currently hiring or accepting applications during the period of claimed disability. (EX 16 at 10-16).

[7]Claimant lives in Newport News, Virginia. All of the jobs identified in the labor market survey are located in or near Newport News, Virginia.

competitive applicant for the position because some computer experience was necessary. The applicant would also need to possess knowledge of automobile brake systems and engine exhaust systems. There is no evidence that Claimant possessed such knowledge.

Furthermore, I do not consider the position with Commonwealth Information Services to be suitable. Kay's February 1, 2001, job search response (EX 21) indicated that there was a hiring freeze in effect during the time of disability claimed. It is beyond question that this job was not available when the employer was not hiring.

I find that the remaining positions identified in the labor market survey are suitable. The unarmed security guard jobs,[8] the assistant manager/service writer position with Kramer Tire, and the Express Car Wash cashier position are evidence of a range of suitable alternative employment. As explained above, these jobs were generally available within Claimant's geographic area and during the claimed period of disability. Furthermore, Dr. Gwathmey's approval is evidence that these jobs are appropriate in light of Claimant's physical restrictions. Finally, I find that these jobs are appropriate considering Claimant's age, work history, and education.

In addition to the positions identified in the labor market survey, Employer submitted EX 23, which consists of job analyses for twenty-one additional positions which Dr. Gwathmey approved. (EX 23). Among the additional positions identified in EX 23, I find that *at least* the following positions are suitable in light of Claimant's work history, education, skills, and physical restrictions: (1) Donation Center Attendant, Goodwill Industries, Hampton, Virginia (EX 23 at 2); (2) Cashier, Walmart, Hampton, Virginia (EX 23 at 4); (3) Delivery Truck Driver, Brake Parts, Hampton, Virginia (EX 23 at 12); (4) Security Attendant, Colonial Williamsburg Foundation, Williamsburg, Virginia (EX 23 at 13); (5) Cashier, Central Parking Systems, Norfolk, Virginia (EX 23 at 15); (6) Taxi Cab Dispatcher, Associated Cabs, Inc., Newport News, Virginia (EX 23 at 16); and (7) Unarmed Security Guard, James York Security LLC, Williamsburg, Virginia (EX 23 at 18).

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[8]Claimant's testimony that an unarmed security guard position would "put him in the position mentally of being armed" does not persuade me that unarmed security jobs are not suitable. There is no evidence in the record to suggest that Claimant suffers from any mental conditions that would make these positions inappropriate. There is no indication that Claimant suffers from flashbacks or post-traumatic stress disorder such that a job as an unarmed security guard might cause him mental or emotional damage. Likewise, there is no evidence that Employer was made aware of or reasonably should have been aware of any potential mental or emotional issues that would make unarmed security guard jobs unsuitable for Claimant. In fact, Claimant's work history, vocational testing results, and prior military experience is evidence that unarmed security would be an appropriate field of employment for Claimant.

There is no evidence to suggest that Claimant would actually be armed or compelled to confront anyone as an unarmed security guard. The job title of "unarmed security guard" directly contradicts Claimant's unsupported assertions. Without some evidence to support Claimant's assertions to the contrary, I find that unarmed security guard is an appropriate position in light of Claimant's history, education, and work restrictions.

Based on the labor market survey (EX 16) and additional job analyses approved by Dr. Gwathmey (EX 23), I find that Employer has satisfied its burden of establishing the existence of suitable alternative employment. I will next consider whether the evidence demonstrates that Claimant diligently sought employment.

3. Diligent job search

Employer has demonstrated that suitable alternative employment exists. Claimant may nevertheless establish total disability if he can show that despite diligent efforts he was unable to obtain employment. *See Tann*, 841 F.2d at 542.

The evidence does not support a finding that Claimant conducted a diligent job search. In fact, the evidence suggests that Claimant's job search was anything but diligent. According to Claimant's own testimony he did little more than contact potential employers. (TR at 30-32). For many of the jobs that could be specifically identified Claimant did not actually leave a resume or fill out a job application. Claimant testified that he submitted applications to various, unnamed employers, but I find that his vague and evasive testimony fails to satisfy his burden of persuasion. In addition, Claimant's evidence that many of the jobs identified were unavailable (EX 27) is specifically contradicted by the information in Kay's reports. I credit Kay's information regarding the availability of jobs, the physical requirements, the qualifications required, and the willingness of potential employers to work with Claimant's restrictions over the self-serving statements made by Claimant in response to Employer's interrogatories.

Not only does Claimant fail to establish diligence due to his vague and evasive testimony, but even if I credit other evidence regarding his job search Claimant was not qualified for several of the positions about which he allegedly inquired. (EX 14 at 21-22). For example, in Claimant's answers to Employer's second set of interrogatories Claimant included a photocopied page of business cards as evidence of his job search as well as a written description of the positions about which he inquired. Claimant inquired about positions as a computer technician, electronics technician, and chiropractic therapist. (EX 14 at 21). There is no evidence that Claimant was in any way qualified for these types of positions. It is unreasonable to make a finding of diligence when the positions for which Claimant applied were unavailable to him by reason of his lack of qualifications. In the same way that Employer may not satisfy its burden on suitable alternative employment by pointing to jobs outside of Claimant's qualifications, so too is Claimant prohibited from establishing diligence by applying for jobs which are outside of his qualifications and skills. An unreasonable job search does not demonstrate diligence.

Furthermore, there is evidence which suggests that Claimant exaggerated his restrictions when he actually spoke with potential employers. (EX 30 at 3). In addition, in those cases in which it can be confirmed that Claimant actually submitted applications, he included statements on job applications such as:

- "I do not know the date I could begin to work because of pending surgery and rehabilitation period." (EX 22).
- "I do not know the date when I could start work due to pending surgery and

rehabilitation period." (EX 22).

- "I do not know when I would be available to start work because of pending surgery and rehabilitation period." (EX 22).

There is no doubt but that this language on job applications guarantees that the prospective employers would not contact Claimant or offer him a job. Claimant's actions regarding these applications is not evidence of diligence.

Claimant's testimony that he felt that cashier positions and unarmed security jobs were inappropriate also supports a finding that he was not diligent in his job search. (TR at 41). I will not credit Claimant's determination that these jobs were unsuitable over Dr. Gwathmey's opinion that the jobs were appropriate. In addition, I do not credit Claimant's testimony or evidence that he sought employment as a cashier or unarmed security guard because his testimony regarding his personal evaluation of suitability reveals that Claimant did not want these jobs.

The evidence presented by Claimant does not convince me that he diligently sought suitable employment. Thus, because Employer has established that suitable alternative employment was available and Claimant has not established that he diligently sought employment, I find that Claimant has failed to establish total disability. As a result, Claimant can at most establish partial disability. Since he has already been paid permanent partial disability for his scheduled injury, he is, therefore, not entitled to additional partial disability compensation even if the evidence established partial disability. His scheduled award for permanent partial disability precludes any additional award for partial disability as a result of the same injuries. *See PEPCO, supra*.

F. Conclusion

I find that Claimant's injury reached permanency no later than February 1996 and prior to the period of disability claimed. Furthermore, I find that Claimant has failed to establish that he was totally disabled between August 30, 1999 and October 26, 2001. Therefore, Claimant is not entitled to temporary total or permanent total disability compensation, and is limited to the compensation for his injuries which has been previously paid pursuant to the schedule at § 908(c) of the Act.

ORDER

It is hereby ORDERED that the claim of Preston L. McKellar for temporary total disability benefits for the period August 30, 1999 to October 26, 2001 is DENIED.

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RICHARD E. HUDDLESTON
Administrative Law Judge